Dato' Sri Andrew Kam Tai Yeow v Tan Sri Dato' Kam Woon Wah & Ors

HIGH COURT (KUALA LUMPUR) — SUIT NO WA-22NCC-352–09 OF 2017
AHMAD KAMAL J
30 JULY 2020

Civil Procedure — Proceedings — Committal proceedings — Ex parte orders granting leave to plaintiff for committal proceeding against proposed contemnors — Applications by proposed contemnors to set aside ex parte orders — Whether there was non-compliance with O 52 r 2B of Rules of Court 2012 by plaintiff — Whether there was non-disclosure/suppression of material facts in filing encls 297 and 300 — Whether there was inordinate delay in filing encls 297 and 300 — Whether encls 297 and 300 were filed due to collateral purpose and constituted abuse of court's process — Rules of Court 2012 O 52

There were four applications ('encls 320, 323, 325 and 328') filed by the proposed contemnors to set aside the ex parte orders ('encls 313 and 314') granting leave to the applicant ('plaintiff') to commence committal proceedings against the proposed contemnors. The plaintiff's applications for leave to commence committal proceedings ('encls 297 and 300') were based on the ground that the proposed contemnors had disobeyed the interim injunction order which restrained the defendants from removing the plaintiff as a director of the second to eleventh defendants. Hence, these applications by the proposed contemnors. The issues for consideration were: (a) whether there was a non-compliance with O 52 r 2B of the Rules of Court 2012 ('the ROC 2012') by the plaintiff; (b) whether there was a non-disclosure/suppression of material facts in filing encls 297 and 300; (c) whether there was inordinate delay in filing encls 297 and 300; and (d) whether encls 297 and 300 were filed due to a collateral purpose and constituted an abuse of the court's process.

Held:

(1) Enclosures 297 and 300 emanated from a breach of court order ie interim injunction order. The type, nature and category of contempt committed in this case constituted a contempt committed in other cases of contempt of court. The allegations of contempt of court levelled against the proposed contemnors in the present proceedings did not constitute contempt in the face of the court as the allegations did not involve any form of misconduct in the course of the proceedings either within the court itself or directly connected with what happened in court. Hence, O 52 r 2A(1) of the ROC 2012 under which rule the requirement of a

formal show cause notice was dispensed with, did not apply to the present proceedings. It was mandatory to issue and serve the notice to show cause under O 52 r 2B of the ROC 2012 if the case fell under a contempt committed in other cases of contempt of court. The plaintiff had not issued or served the notice to show cause under O 52 r 2B of the ROC 2012 prior to the filing of encls 297 and 300 to the proposed contemnors. Thus, encls 313 and 314 as well as the filing of encls 297 and 300 were invalid and was not curable under O 1A and O 2 of the ROC 2012 (see paras 33, 37–38 & 46–48).

(2) The content of a letter dated 31 October 2019 had been disclosed to court and exhibited. Thus, the plaintiff had made full disclosure of fact in filing encls 297 and 300. There was no delay or abuse of the court's process in the plaintiff applications as parties were communicating with correspondence until October 2019 (see paras 50–51).

(3) In the circumstances, the ex parte applications for leave to issue contempt proceedings against the proposed contemnors in encls 297 and 300 were not made in a proper manner. The leave orders granted (encls 313 and 314) were invalid and should be set aside. The proposed contemnors' applications in encls 320, 323, 325 and 328 to set aside encls 313 and 314 were allowed and encls 311 and 312 were struck out (see para 52).

[Bahasa Malaysia summary

Terdapat empat permohonan ('lampiran 320, 323, 325 dan 328') yang difailkan oleh penghina yang dicadangkan untuk mengetepikan perintah ex parte ('lampiran 313 and 314') yang membenarkan kepada pemohon ('plaintif') untuk memulakan prosiding komital terhadap penghina yang dicadangkan. Permohonan kebenaran plaintif untuk memulakan prosiding komital ('lampiran 297 dan 300') didasarkan pada alasan bahawa penghina yang dicadangkan telah melanggar perintah injunksi sementara yang menghalang defendan daripada mengeluarkan plaintif sebagai pengarah kedua hingga kesebelas defendan. Oleh itu, permohonan ini oleh penghina yang dicadangkan. Isu-isu untuk pertimbangan adalah: (a) sama ada terdapat ketidakpatuhan terhadap A 52 k 2B Kaedah-Kaedah Mahkamah 2012 ('Kaedah tersebut') oleh plaintif; (b) sama ada terdapat ketiadaan pendedahan/penyekatan fakta material dalam pemfailan lampiran 297 dan 300; (c) sama ada terdapat kelewatan dalam memfailkan lampiran 297 dan 300; dan (d) sama ada lampiran 297 dan 300 difailkan kerana tujuan jaminan dan merupakan penyalahgunaan proses mahkamah.

Diputuskan:

(1) Lampiran 297 dan 300 berasal daripada pelanggaran perintah mahkamah iaitu perintah injunksi sementara. Jenis, sifat dan kategori penghinaan yang dilakukan dalam kes ini merupakan penghinaan yang

dilakukan dalam kes penghinaan mahkamah yang lain. Tuduhan penghinaan mahkamah terhadap penghina yang dicadangkan dalam prosiding ini bukan merupakan penghinaan yang dilakukan ketika berhadapan dengan mahkamah kerana tuduhan tersebut tidak melibatkan sebarang bentuk kesalahan dalam prosiding tersebut sama ada di dalam mahkamah itu sendiri atau secara langsung berkaitan dengan apa yang berlaku di mahkamah. Oleh itu, A 52 k 2A(1) Kaedah tersebut di mana peraturan syarat menyerahkan notis tunjuk sebab formal, tidak terpakai untuk prosiding ini. Adalah wajib untuk mengeluarkan dan menyerahkan notis tunjuk sebab di bawah A 52 k 2B Kaedah tersebut sekiranya kes tersebut berada di bawah penghinaan yang dilakukan dalam kes penghinaan mahkamah yang lain. Plaintif tidak mengeluarkan atau menyerahkan notis tunjuk sebab di bawah A 52 k 2B Kaedah tersebut sebelum pemfailan lampiran 297 dan 300 kepada penghina yang dicadangkan. Oleh itu, lampiran 313 dan 314 serta pemfailan lampiran 297 dan 300 tidak sah dan tidak boleh diperbetulkan di bawah A 1A dan A 2 Kaedah tersebut (lihat perenggan 33, 37–38 & 46–48).

(2) Kandungan surat bertarikh 31 Oktober 2019 telah didedahkan kepada mahkamah dan diekshibitkan. Oleh itu, plaintif telah membuat pendedahan penuh fakta dalam pemfailan lampiran 297 dan 300. Tidak ada kelewatan atau penyalahgunaan proses mahkamah dalam permohonan plaintif ketika pihak berkomunikasi dengan surat-menyurat sehingga Oktober 2019 (lihat perenggan 50–51).

(3) Dalam keadaan seperti itu, permohonan ex parte untuk kebenaran untuk mengeluarkan prosiding komital terhadap penghina yang dicadangkan dalam lampiran 297 dan 300 tidak dibuat dengan cara yang betul. Perintah kebenaran yang diberikan (lampiran 313 dan 314) tidak sah dan harus diketepikan. Permohonan penghina yang dicadangkan di lampiran 320, 323, 325 dan 328 untuk mengetepikan lampiran 313 dan 314 dibenarkan dan lampiran 311 dan 312 dibatalkan (lihat perenggan 52).]

Cases referred to

Attorney General v British Broadcasting Corporation [1980] 3 All ER 161, HL (refd)

Mohd Ezri bin Saad v Tan Sri Dato' Sri Khalid bin Abu Bakar (Pengerusi Lembaga Tatatertib Polis Diraja Malaysia, Bukit Aman) & Ors [2018] MLJU 1603, HC (refd)

Kumaraendran, An Advocate & Solicitor, Re [1975] 2 MLJ 45 (refd)

Peguam Negara Malaysia v Mkini Dotcom Sdn Bhd & Anor [2020] 4 MLJ 791; [2020] 1 LNS 338, FC (refd)

Summit Holdings Ltd & Anor v Business Software Alliance [1999] 2 SLR R 592; [1999] 3 SLR 197, HC (refd)

A *Tan Boon Thien & Anor v Tan Poh Lee & Ors* [2019] MLJU 1972; [2020] 3 CLJ 28, CA (refd)
Tang Hak Ju v Pengarah Tanah Dan Galian Pulau Pinang & Ors [2016] MLJU 696; [2017] 2 CLJ 345, HC (refd)
Uthayakumar a/l Ponnusamy v Abdul Wahab bin Abdul Kassim (Ketua Pengarah
B *Penjara Kajang) & Ors* [2020] 2 MLJ 259; [2020] 1 CLJ 82, CA (refd)

Legislation referred to

Courts of Judicature Act 1964 s 13
Criminal Procedure Code
C Federal Constitution art 126
Rules of Court 2012 O 1A, O 2, O 52, O 52 rr 2A, 2A(1), 2B

Mathew Thomas Philip (Nicholas Navaron Chula with him) (Thomas Philip) for the plaintiff.
D *Gopal Sri Ram (YC Wong, David Yii Hee Kiet and Yarmeen Soh Sha Nisse with him) (YC Wong) for the proposed contemnor: first defendant, Chew Tee Beng and Tai Swe Chong (encls 320 and 323).*
Lim Choon Khim (Chin Yan Len with him) (Chooi Saw & Lim) for the proposed
E *contemnor: Edward Kam Tai Keong and Linda Kam Thai Eng (encls 325 and 328).*

Ahmad Kamal J:

F

INTRODUCTION

[1] There are four applications (encls 320, 323, 325 and 328) filed by the proposed contemnors to set aside the ex parte orders dated 12 December 2019
G granting leave to the plaintiff/applicant to commence committal proceedings against the proposed contemnors.

BACKGROUND FACTS

H **[2]** On 12 December 2019, the plaintiff/applicant had obtained an ex parte order (encl 313) granting leave to the plaintiff/applicant to commence committal proceedings against the followings proposed contemnors:

(a) Tan Sri Dato' Kam Woon Wah as the director of the second defendant;
I (b) Chew Tee Beng as the director of the second and third defendant;
(c) Tai Swe Chong as the director of the third defendant;
(d) Linda Kam Thai Eng as the director of the second and third defendant; and

(e) Edward Kam Tai Keong as the directors of the second and the third defendant.

[3] On the same day, the plaintiff/applicant had also obtained another an ex parte order (encl 314) granting leave to the plaintiff/applicant to commence committal proceedings against Tan Sri Dato' Kam Woon Wah as the director of the eighth defendant.

[4] The plaintiff/applicant's applications for leave to commence committal proceedings (encls 297 and 300) are based on the ground that the proposed contemnors had disobeyed the interim injunction order dated 29 March 2018 (interim injunction order) which restrains the defendants from removing the plaintiff/applicant as a director of the second to eleventh defendants.

[5] It is the plaintiff/applicant's contentions that all the proposed contemnors had breached the interim injunction order by refusing to recognise the plaintiff/applicant as a director and by taking the position that the plaintiff/applicant has retired as a director of the second to eleventh defendants.

[6] Upon being served with the relevant cause papers, the proposed contemnors then filed the following applications:

(a) the proposed contemnors Tan Sri Dato' Kam Woon Wah filed notice of application dated 8 January 2020 (encl 320) to set aside encl 314;

(b) the proposed contemnors Tan Sri Dato' Kam Woon Wah, Chew Tee Beng and Tai Swe Chong filed notice of application dated 8 January 2020 (encl 323) to set aside encl 313;

(c) the proposed contemnors Edward Kam Tai Keong filed notice of application dated 13 January 2020 (encl 325) to set aside encl 313; and

(d) the proposed contemners Linda Kam Thai Eng filed notice of application dated 13 January 2020 (encl 328) to set aside encl 313.

PARTIES SUBMISSIONS

[7] Based on the proposed contemners' applications and written submissions, the proposed contemners had raised four main grounds to set aside encls 313 and 314 and it can be summarised as follows:

(a) non-compliance with O 52 r 2B of the Rules of Court 2012 ('the ROC 2012');

(b) non-disclosure/suppression of material facts in the plaintiff/applicant's ex-parte application for leave (encls 297 and 300);

A (c) inordinate delay in filing encls 297 and 300; and

(d) encls 297 and 300 were filed due to a collateral purpose and constitute an abuse of the court's process.

B **[8]** However, during the course of oral submissions, parties had confined its submissions to two issues which are non-compliance with O 52 r 2B of the ROC 2012 and non-disclosure/suppression of material facts in filing encls 297 and 300.

C *Non-compliance with Order 52 rule 2B of the ROC 2012*

[9] It is the contentions of the proposed contemners that encls 313 and 314 ought to be set aside *ex debito justitiae* due to the failure of the plaintiff/applicant to issue the notice to show cause under O 52 r 2B of the D ROC 2012 prior to the filing of encls 297 and 300.

[10] The proposed contemners then support its contention by relying among others on the Court of Appeal cases of *Tan Boon Thien & Anor v Tan Poh Lee & Ors* [2019] MLJU 1972; [2020] 3 CLJ 28 and *Uthayakumar a/l Ponnusamy v Abdul Wahab bin Abdul Kassim (Ketua Pengarah Penjara Kajang) & Ors* [2020] 2 MLJ 259; [2020] 1 CLJ 82. E

[11] The plaintiff/applicant disagreed with the proposed contemners' contentions and argued that the plaintiff/applicant is not required to issue a F show cause notice before filing of encls 297 and 300 as the acts and conducts of the proposed contemners are acts of contempt in the face of court as regulated under O 52 r 2A(1) of the ROC 2012. The plaintiff/applicant then support its contention by relying among others on the Federal Court case of *Peguam Negara Malaysia v Mkini Dotcom Sdn Bhd & Anor* [2020] 4 MLJ 791; [2020] G 1 LNS 338 and a High Court case of *Tang Hak Ju v Pengarah Tanah Dan Galian Pulau Pinang & Ors* [2016] MLJU 696; [2017] 2 CLJ 345.

[12] The plaintiff/applicant contended that the alleged contempt is a H contempt in the face of the court due to the following reasons:

(a) the issuance of letters dated 28 May 2019 and 29 October 2019 as well as the commencement of Originating Summons No WA-24NCC-574–10 of 2019 ('OS 574') were done whilst the proceedings in this suit is still pending before this court;

I (b) the commencement of OS 574 occurred in this court; and/or

(c) the issuance of letters dated 28 May 2019 and 29 October 2019 as well as the commencement of OS 574 are in breach of a court order ie the interim injunction order.

[13] The plaintiff/applicant further submitted that the non-issuance of a show cause notice to the proposed contemnors is not fatal to encls 297 and 300 as it does not cause prejudice to the proposed contemnors and are therefore mere technical irregularities.

[14] In reply to the plaintiff/applicant's contentions above, the proposed contemnors contended that the alleged contempt is not contempt in the face of the court for the following reasons:

(a) the alleged breach of the interim injunction order is not physical interruption or a scandalising of the court;

(b) this present case is not a case which it is necessary for immediate action to be taken by the court in dealing with the contempt as this case could be dealt with based on affidavits of evidence adduced by the parties; and

(c) this present case is not a case where this court is invited to exercise its power of summary judgment, ie to punish a man on the spot which the relevant procedure is provided by O 52 r 2A of the ROC 2012.

[15] The proposed contemnors then relied among others on the cases of *Re Kumaraendran, An Advocate & Solicitor* [1975] 2 MLJ 45; *Summit Holdings Ltd & Anor v Business Software Alliance* [1999] 2 SLR R 592; [1999] 3 SLR 197 and *Attorney General v British Broadcasting Corporation* [1980] 3 All ER 161 to support its contentions.

[16] Due to the above reasons, it is the proposed contemners' contentions that the issuance of the notice to show cause under O 52 r 2B of the ROC 2012 prior to the filing of encls 297 and 300 is mandatory.

Non-disclosure/suppression of material facts in filing encls 297 and 300

[17] It is the contention of the proposed contemners that the plaintiff/applicant failed to disclose the content of a letter dated 31 October 2019 to court where the said letter had given notice to the plaintiff/applicant solicitor that if the plaintiff/applicant is moving the court for leave to file commital proceedings, they want to be heard on the same.

[18] It is also the contention of the proposed contemners that the plaintiff/applicant failed to disclose to the court that the proposed contemners had obtained leave to commence commital proceedings against, inter alia, the plaintiff/applicant in Originating Summons No WA-24NCC-609–11 of 2019 ('OS 609') for purportedly intimidating potential witness and obstructing the administration of justice.

A **[19]** In response to the proposed contemners' contentions, the plaintiff/applicant contended that the content of the said letter had been disclosed to court as it has been exhibited in exh A10 of encl 299 and exh A11 of encl 301.

B **[20]** The plaintiff/applicant also contended that they have disclosed to the court that the proposed contemners had obtained leave to commence commital proceedings in OS 609 against, inter alia, the plaintiff/applicant on the hearing of encls 297 and 300.

C *Inordinate delay in filing encs 297 and 300*

[21] It is the contention of the proposed contemners that there is an inordinate delay in the plaintiff/applicant applications as the leave to
D commence commital proceedings were only filed on 21 November 2019 and 29 November 2019 which is more than a year after being aware of the companies' position in respect of the plaintiff/applicant's directorship since April 2018.

E **[22]** In response to the proposed contemners' contentions, the plaintiff/applicant contended that there is no delay in the plaintiff/applicant's applications as there has been continuous committal acts and conduct on the part of the proposed contemners in October 2019.

F *Enclosures 297 and 300 were filed due to a collateral purpose and constitute an abuse of the court's process*

[23] It is the contention of the proposed contemners that encls 297 and 300
G were filed due to a collateral attack on the filing of OS 574 and OS 609 respectively and a further intimidation of a party litigants and potential witnesses therein. Thus, encls 297 and 300 constitute an abuse of the court's process.

H **[24]** In response to the proposed contemners' contentions, the plaintiff/applicant denied that the filing of encls 297 and 300 constitute an abuse of the court's process and contended that the acts and conduct of the proposed contemners particularly in procuring OS 574 and OS 609 are an abuse of the process of court.

I FINDINGS OF THE COURT

[25] Based on the analysis of the parties' applications and submissions, the court has identified the following issues to be considered by this court:

(a) whether there is a non-compliance with O 52 r 2B of the ROC 2012 by the plaintiff/applicant;

(b) whether there is a non-disclosure/suppression of material facts in filing encls 297 and 300;

(c) whether inordinate delay in filing encls 297 and 300; and

(d) whether encls 297 and 300 were filed due to a collateral purpose and constitute an abuse of the court's process.

Whether there is a non-compliance with O 52 r 2B of the Rules of Court 2012 by the plaintiff/applicant

[26] In this present case, it is not disputed that the plaintiff/applicant had not issue or serve notice to show cause under O 52 r 2B of the ROC 2012 prior to the filing of encls 297 and 300 to the proposed contemners.

[27] However, before this court could determine the issue of non-compliance with O 52 r 2B of the ROC 2012, the court must first determine whether this case constitutes a contempt committed in the face of the court or a contempt committed in other cases of contempt of court as the procedure to commence contempt proceedings is vary depending on the nature or type of the contempt.

[28] Before this court goes in depth on this issue, the court must first observe the relevant provisions on the power to initiate any contempt proceedings as stated in art 126 of the Federal Constitution ('the FC') and is similarly stated under s 13 of the Courts of Judicature Act 1964 ('the CJA').

[29] Article 126 of the FC and s 13 of the CJA reads as follows:

> Article 126 Power to punish for contempt
>
> The Federal Court, the Court of Appeal or a High Court shall have power to punish any contempt of itself.
>
> 13 Contempt
>
> The Federal Court, the Court of Appeal and the High Court shall have power to punish any contempt of itself.

[30] The court then observe the procedural requirements to commence a contempt proceedings as provided in O 52 of the ROC 2012 which reads as follows:

> 52 Committal
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> 1 ...
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> 2 Committal for contempt of Court (O 52 r 2)

The court may, on the application of any party to any cause or matter or on its own motion, make an order of committal in Form 107.

2A Contempt committed in the face of the Court (O 52 r 2A)

(1) If a contempt is committed in the face of the court, it shall not be necessary to serve a formal notice to show cause, but the court shall ensure that the person alleged to be in contempt understands the nature of the offence alleged against him and has the opportunity to be heard in his own defence, and the court shall make a proper record of the proceedings.

(2) Where a Judge is satisfied that a contempt has been committed in the face of the court, the Judge may order the contemnor to appear before him on the same day at the time fixed by the court for the purpose of purging his contempt.

(3) Where such person has purged his contempt by tendering his unreserved apology to the court and the Judge considers the contempt to be not of a serious nature, the Judge may excuse such person and no further action shall be taken against him.

(4) Where such person declines or refuses to purge his contempt, then the Judge shall sentence him.

2B Other cases of contempt (O 52 r 2B)

In all other cases of contempt of court, *a formal notice to show cause why he should not be committed to the prison or fined shall be served personally.*

3 Application to Court (O 52 r 3)

(1) No application to a court for an order of committal against any person may be made unless leave to make such an application has been granted in accordance with this rule.

(2) An application for such leave must be made *ex parte* to the court by a notice of application supported by a statement setting out the name and description of the applicant, the name, description and address of the person sought to be committed and the grounds on which his committal is sought, and by an affidavit, to be filed before the application is made, verifying the facts relied on. (Emphasis added.)

[31] Based on O 52 of the ROC 2012 above, it is clear that there are two types of contempts and the procedure to commence contempt proceedings is differ, depending on the type of the contempt. If the act of contempt is commited in the face of the court, r 2A is applicable and if the contempt is committed in other cases of contempt of court, then r 2B is applicable.

[32] Hence, it is important for this court to determine first the type, nature and category of contempt committed before determine its relevant procedure.

[33] In this present case, it is vital to note that encls 297 and 300 emanate from a breach of court order ie interim injunction order. Thus, the issue before this court is whether a breach of court order constitutes a contempt committed in the face of the court or a contempt committed in other cases of contempt of court.

[34] In deciding this matter, this court has made several references to the Court of Appeal cases where the cases clearly explain that the act of breach of court order falls under a contempt committed in other cases of contempt of court as provided under O 52 r 2B of the ROC 2012.

[35] This can be seen in the Court of Appeal case of *Tan Boon Thien* as follows:

> [12] The filing of the Singapore HSBC suit came to the knowledge of the first respondent. To the respondents, the filing of the Singapore HSBC suit and especially the prayer sought in the injunction application by the first appellant was a clear breach of the stay order and also an interference with the due administration of justice. The first respondent then filed an ex parte application in encl 61 for leave to issue contempt proceedings against the first appellant under O 52 r 2 of the Rules of Court 2012 ('the ROC 2012').
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> [13] On 25 July 2019, this court heard the application for leave (encl 61). On being satisfied that the first respondent had made out a prima facie case against the first appellant, this court granted leave to the first respondent (the leave order).
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> [14] By encl 81, the first appellant applied to set aside the leave order.
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> ...
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> [22] It is clear that based on O 52, there are two different sets of procedure to commence contempt proceedings depending on the nature or category of contempt in issue: r 2A is where the act of contempt is in the face of the court; and r 2B which deals with other forms of contempt. The case before us falls under the second category.
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> (Emphasis added.)

[36] Another can be seen in the Court of Appeal case of *Uthayakumar* as follows:

> [20] In *Dr Leela Ratos & Ors v Anthony Ratos s/o Domingos Rotas & Ors* [1997] 1 MLJ 704; [1997] 1 CLJ Supp 115 the High Court had alluded to these two categories of contempt in the following terms:
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> > [3] Contempt of court may be classified either as (1) criminal contempt consisting of words or acts obstructing or tending to obstruct or interfere with the administration of justice, or (2) contempt in procedure, otherwise known as civil contempt, *consisting of disobedience to the judgments, orders or other process of the court*, and involving a private injury and criminal contempt is an offence

punishable by imprisonment or a fine or by an order to give security for good behaviour.

[21] In *Miller v Miller,* 652 SE 2d 754 Court of Appeal 2007, the Court of Appeals of South Carolina had in very clear terms explained the difference in classification between civil and criminal contempt, and it would be apposite to quote the relevant passage from that decision, as it is highly persuasive and relevant to the issue at hand:

> *The determination of whether contempt is civil or criminal depends on the underlying purpose of the contempt ruling*. In *Floyd v Floyd,* we provided a comprehensive review of the differences between civil and criminal contempt:
>
> The major factor in determining whether a contempt is civil or criminal is the purpose for which the power is exercised, including the nature of the relief and the purpose for which the sentence is imposed. *The purpose of civil contempt is to coerce the defendant to do the thing required by the order for the benefit of the complainant.*
>
> *The primary purposes of criminal contempt are to preserve the court's authority and to punish for disobedience of its orders.* If it is for civil contempt the punishment is remedial, and for the benefit of the complainant. But if it is for criminal contempt the sentence is punitive, to vindicate the authority of the court.

Hence, the Court of Appeals of South Carolina had differentiated the two categories of contempt by determining the underlying purpose of the contempt ruling. *If the purpose of the contempt ruling is remedial, ie, for the benefit of the complainant, then it is civil. And if it is to preserve the court's authority and keep pure the administration of justice, then it is criminal.* The basis of this dichotomy is discussed in some depth in an earlier academic article — *Distinction Between Civil and Criminal Contempt — Donner et al v Calvert Distillers Corp,* 12 Md L Rev 241 (1951) (available at: *http://digita lcommons.law.umaryland.edu/mlr/vol12/iss3/6*).

...

[25] In terms of the applicable procedure, contempt proceedings can be divided into three distinct categories, namely:

(i) Court cited — *for contempt in the face of the court or scandalising the court, where the procedure is summary in nature.* The court taking cognisance of the contempt committed can proceed summarily to deal with the matter: see *PP v Seeralan Suppiah* [1985] 2 MLJ 30; [1985] 1 CLJ 524; [1985] CLJ Rep 250 (SC); *Cheah Cheng Hoc v PP* [1986] 1 MLJ 299; [1986] 1 CLJ 169; [1986] CLJ Rep 84 (SC); *Re Zainur Zakaria* [1999] 2 MLJ 577; [1999] 3 CLJ 696. *Though this form of contempt is termed as criminal contempt, the procedure to be followed is not found in the Criminal Procedure Code, for it is not criminal proceeding in the traditional sense. The procedure is in fact spelt out in O 52 r 2A of the Rules of Court 2012*, that reads:

...

As can be appreciated, the procedure for contempt in the face of the court, when initiated by the court, though summary in nature, is far removed from the summary criminal proceedings under the Criminal Procedure Code .

(ii) Attorney general initiated — *for contempt in the face of the court or for scandalising the court with the aim of protecting the dignity and integrity of the judicial institution.*

Further, the attorney general may also institute proceedings for contempt not committed in the face of the court. The attorney general may do so even where he nor the Government were parties to the proceedings. In *Arthur Lee Meng Kwang v Faber Merlin (M) Bhd & Ors* [1986] 2 MLJ 193; [1986] 2 CLJ 109; [1986] CLJ Rep 58 (SC), Mohamed Azmi SO said:

> When the contempt is not committed in the face of the court, as is the case alleged here, it is equally important that the dignity and integrity of the court be protected and preserved, and in such cases the contempt proceedings may be initiated by motion either by the attorney general or any private party who has sufficient interest in the matter, or even by the court itself, although in practice it seems unjust to expect the court to protect itself by being both complainant and judge, save in the unlikely event of the attorney general or the appropriate private party declining to act.
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> In such instances, how does the attorney general or the appropriate party having sufficient interest in the matter move the court for an order of committal for contempt. It is clear from the pronouncement of the Supreme Court in *Arthur Lee Meng Kuang* that the proper procedure is by way of motion under O 52 of the Rules of the High Court 1980, which is in *pari materia* with the present O 52 of the Rules of Court 2012.
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> This was confirmed by the Federal Court in the recent case of *PCP Construction Sdn Bhd v Leap Modulation Sdn Bhd (Asian International Arbitration Centre, intervener)* [2019] 4 MLJ 747; [2019] 6 CLJ 1 (FC), where the attorney general sought an order for committal against a solicitor for contempt of court, more particularly for scandalising the court. The attorney general made the application in accordance with the procedure spell out in O 52 of the Rules of Court 2012. The Federal Court granted ex parte leave to the attorney general pursuant to O 52 r 3 of the Rules of Court 2012. Following which, the substantive motion for committal was heard by the Federal Court and the proceedings were done in accordance with the requirements under O 52 of the Rules of Court 2012. Though this category of contempt may be termed as criminal contempt, the proceedings were nevertheless done in accordance with O 52 of the Rules of Court 2012. The Federal Court reiterated that:
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> [48] Although Parliament has not enacted specific law on contempt of court, the jurisdiction and power to deal with contempt is encapsulated in art 126 of the Federal Constitution, s 13 of the Courts of Judicature Act ('the CJA') 1964 as well as O 52 of the Rules of Court 2012.

(iii) Party initiated — there are two instances where any party with sufficient interest in the subject matter may initiate contempt proceedings. The first is *to seek compliance of any order of court to compel the contemnor to perform what is stipulated in the court order, often for the benefit of the applicant, which would be civil contempt.* The second is to uphold and vindicate the authority of the court, when the alleged contemnor's action or inaction interferes with the due administration of justice, which would be criminal contempt. *In both cases, the procedure is the same, ie, that which is prescribed in O 52, and in particular the followings rules:*

> 2B. Other cases of contempt (O 52 r 2B)

A ...

[26] Having regard to the above, since the present motion for contempt by the appellant was party initiated, whether it be categorised as civil or criminal contempt, it was entirely correct for the learned High Court Judge to have held that the procedural requirements under O 52 of the Rules of Court 2012 must be strictly adhered to. This was also the finding of the Court of Appeal in CA No 1, which was subsequently affirmed by the Federal Court. The appellant argued that O 52 of the Rules of Court 2012 has no application to his application for reasons discussed earlier. However, the fact that the appellant had applied for ex parte leave to commence committal proceedings is in itself an acknowledgment by the appellant that the applicable procedure is that which is stipulated in O 52 of the Rules of Court 2012. Further, when queried as to what other procedures were available in law to handle an application for contempt, other than that provided in O 52 of the Rules of Court 2012, learned counsel for the appellant was unable to show us any. Hence, the applicable procedure when the court is moved for contempt by the attorney general or an interested party is that which is found in O 52 of the Rules of Court 2012. *The process has to start with a formal show cause notice under O 52 r 2B of the Rules of Court 2012 and continue there from*. (Emphasis added.)

[37] Based on the above Court of Appeal cases, it can be seen that the act of breach of court order falls under a contempt committed in other cases of contempt of court. Hence, this court finds that the type, nature and category of contempt committed in this case constitutes a contempt committed in other cases of contempt of court.

[38] Further I find that the allegations of contempt of court levelled against the proposed contemners in the present proceedings do not constitute contempt in the face court as the allegations did not involve any form of misconduct in the course of proceedings either within the court itself or directly connected with what happened in court. Hence, O 52 r 2A(1) of the ROC 2012 under which rule the requirement of a formal show notice is dispensed with, does not apply to present proceedings (see *Re Kumaraendran; Summit Holdings Ltd; British Broadcasting Corporation and Zainur Zakaria)*

[39] Based on the above, this court disagrees with the plaintiff/applicant's contention that the act of contempt in this case is a contempt in the face of the court which falls under O 52 r 2A of the ROC 2012.

[40] The Federal Court case of *MKini Dotcom* cited by the plaintiff/applicant to support its contentions is a case of scandalising the judiciary and thus does not bind this court as this present case involves a case of breach of court order. Further, the said Federal Court case is confined to its own facts as stated below:

[6] The other grounds relied upon by the respondents to set aside the leave are the followings:

(a) O 52 r 2B of the Rules Of Court 2012 — procedural requirement:
On the requirement of notice pursuant to O 52 r 2B which has not been complied with, on the facts of this case, we agree that the non-compliance is not fatal or prejudicial to the respondents; and

(b) commencement at Federal Court:
Looking at the nature of the impugned comments earlier elaborated, which implicate the judiciary as a whole, which also include the Chief Justice of the Federal Court, we are of the view that this court is the right forum to commence these proceedings.
(Emphasis added.)

[41] Further, the High Court case of *Tang Hak Ju* cited by the plaintiff/applicant to support its contentions has been disagreed by the Court of Appeal in the case of *Tan Boon Thien* which reads as follows:

[34] ... We therefore disagree with the High Court in *Tang Hak Ju* and prefer the view and approach in *IOI Pelita Plantation Sdn Bhd v Lah Anyie Ngau & Ors*. (Emphasis added.)

[42] The plaintiff/applicant further contended that the case of *Tang Hak Ju* is in conflict with the Court of Appeal case of *Tan Boon Thien* as the appeal against the decision of the High Court in *Tang Hak Ju* has been dismissed by Court of Appeal and the leave to appeal to the Federal Court has been dismissed as well.

[43] On that contention, this court disagrees with the said position taken by the plaintiff/applicant as the plaintiff/applicant failed to provide any written grounds to support and/or explain that principle of law but merely provide the seal order of the decision.

[44] Hence, the plaintiff/applicant's contention cannot be agreed upon as stated in the case of *Mohd Ezri bin Saad v Tan Sri Dato' Sri Khalid bin Abu Bakar (Pengerusi Lembaga Tatatertib Polis Diraja Malaysia, Bukit Aman) & Ors* [2018] MLJU 1603 as follows:

[25] The applicant relied on the case of *Mohd Johan Khair bin Azmi v Tan Sri Dato' Sri Khalid bin Abu Bakar (DIG) dan 3 Lagi* (MTKL 25–93–04 of 2013) which granted a prayer for damages and this was affirmed by the Court of Appeal on appeal. *However, there are no written grounds given by the Court of Appeal with regards to the issue of the granting of damages. For a decision of the superior court to be a binding precedent, within the principle of stare decision, there must be written grounds to support and/or explain that principle of law*. In *S Selvaraja a/l T Singarathevar v Timbalan Menteri Hal Ehwal Dalam Negeri Malaysia & Anor* [1997] MLJU 476; [1997] CLJ Supp 275, the court held as follows:

A *Under the principle of stare decisis, the court below is bound to follow the decision on a point which constituted a ratio decidendi of a superior court.* And, such ratio decidendi is binding upon the court below:

(a) if it is expressed in *a written judgment,* published or unpublished, of a superior court, which judgment the court below is itself aware of or is cited to by counsel in the proceedings;

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(b) the *ratio decidendi is clear and unequivocal and based on a point necessary to or arising for decision.* (This is almost always to be ascertained by an analysis of the material facts of the case for a judicial decision. For it is not part of the court's duty to spell out with difficulty a ratio decidendi in order to be bound by it (see *The Mostyn* [1928] AC 57 at p 78 HL. Statements which are not necessary to the decision, which go beyond the occasion and lay down rule that is unnecessary for the purpose in hand, have no binding authority, and are generally termed obiter dictum); and

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(c) the point arising for decision, in the case before the court, based upon its factual pattern, is sufficiently and closely identifiable (though not necessarily identical) with the ratio decidendi as ascertained by an analysis of the material facts of the binding precedent. (Emphasis added.)

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E **[45]** Hence, due to the above authorities it is well established that this present case falls under a contempt committed in other cases of contempt of court.Thus, the next issue that must be considered by this court is whether there is a non-compliance with O 52 r 2B of the ROC 2012 by the plaintiff/applicant.

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[46] Based on the Court of Appeal case of *Tan Boon Thien*, it is mandatory to issue and serve the notice to show cause under O 52 r 2B of the ROC 2012 if the case falls under a contempt committed in other cases of contempt of court. The said case states as follows:

G [34] *Based on the foregoing reasons, we are of the considered view that r 2B requires mandatory compliance and its failure will render the subsequent proceedings invalid*. We are of the view that the Rules Committee in its wisdom enacted r 2B with *the purpose that the proposed contemnor be given the first opportunity of answering to the notice to show cause before any application for leave is made. The leave application should be made only after the expiry of the period that the answer should be given and it is only when and where there is no reply or no satisfactory explanation given that any ensuing action is taken*.

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Further, we say that as the result of contempt proceedings being criminal in nature involving the liberty of the proposed contemnor (see the Federal Court decision in *Tan Sri Dato' (Dr) Rozali Ismail & Ors v Lim Pang Cheong @ George Lim & Ors* [2012] 3 MLJ 458; [2012] 2 CLJ 849; [2012] 2 AMR 429), any ambiguity and uncertainty must be resolved in favour of the alleged contemnor (see the Supreme Court decision in *Wee Choo Keong v MBf Holdings Bhd & Anor and another appeal* [1995] 3 MLJ 549; [1995] 4 CLJ 427). Thus, r 2B should be read in favour of the proposed contemnor. We therefore disagree with the High Court in *Tang Hak*

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Ju and prefer the view and approach in *IOI Pelita Plantation Sdn Bhd v Lah Anyie Ngau & Ors*.

[35] Based on the above reasons, we also opine that failure to comply with r 2B is not curable under O 1A and O 2 of the ROC 2012. (Emphasis added.)

[47] It is not disputed that the plaintiff/applicant had not issue or serve notice to show cause under O 52 r 2B of the ROC 2012 prior to the filing of encls 297 and 300 to the proposed contemners.

[48] Hence, based on the Court of Appeal case above, as consequent to the failure of the plaintiff/applicant issue or serve notice to show cause under O 52 r 2B of the ROC 2012 prior to the filing of encls 297 and 300 to the proposed contemners, thus encls 313 and 314 as well as the filing of encls 297 and 300 are invalid and is not curable under O 1A and O 2 of the ROC 2012.

Whether there is a non-disclosure/suppression of material facts in filing encls 297 and 300

[49] It is the contention of the proposed contemnors that the plaintiff/applicant failed to disclose the content of a letter dated 31 October 2019 to court where the said letter had given notice to the plaintiff/applicant solicitor that if the plaintiff/applicant is moving the court for leave to file commital proceedings, they want to be heard on the same.

[50] On this issue, this court is with the plaintiff/applicant as the content of the said letter had been disclosed to court as exhibited in exh A-10 of encl 299 and exh A-11 of encl 301. Thus, the plaintiff/applicant has made full disclosure of fact on this issue.

Whether inordinate delay in filing encls 297 and 300

Whether encls 297 and 300 were filed due to a collateral purpose and constitute an abuse of the court's process

[51] On this issue, this court finds that there is no delay or abuse of the court's process in the plaintiff/applicant's applications as parties were communicating with correspondence until October 2019.

CONCLUSION

[52] In view of the reasons above, the court hold that:

(a) the ex parte applications for leave to issue contempt proceedings against the proposed contemners in encls 297 and 300 were not made in a proper manner;

A (b) the leave orders granted on 12 December 2019 (encls 313 and 314) are invalid and should be set aside;

(c) the proposed contemners' applications in encls 320, 323, 325 and 328 to set aside encls 313 and 314 are allowed;

B (d) the plaintiff/applicant pay costs to the proposed contemners in encls 320 and 323 RM10,000 subject to payment of the allocator fees;

(e) the plaintiff/applicant pay costs to the proposed contemners in encls 325 and 328 RM20,000 subject to payment of the allocator fees; and

C (f) as consequence, encls 311 and 312 are strike out.

Order accordingly.

Reported by Nabilah Syahida Abdullah Salleh

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